Filed 11/20/08 P. v. Bradley CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. SEAN CHRISTIAN BRADLEY, Defendant and Appellant.	B199711 (Los Angeles County Super. Ct. No. YA065542)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark S. Arnold, Judge. Affirmed.

Irma Castillo, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Nancy G. James, Deputy Attorneys General, for Plaintiff and Respondent.

In the death of his six-month-old son Sean Jr. (Sean), appellant Sean Patrick Bradley was convicted of second degree murder (Pen. Code, § 187; undesignated section references are to that code) and assault on a child under age eight in one's custody or care, by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death (§ 273ab).[1] Appellant was sentenced to the statutory term of 25 years to life on the section 273ab count; his 15-years-to-life sentence on the murder count was stayed under section 654.

On appeal, appellant makes three contentions: (1) admission of evidence of prior injuries to Sean was prejudicial error; (2) appellant's counsel rendered ineffective assistance by failing to request a limiting instruction concerning the prior injury evidence; and (3) the murder conviction is not supported by substantial evidence of implied malice. We find these contentions unmeritorious, and affirm.

FACTS

Viewed in accordance with the governing rules of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence at trial showed that in May 2005 appellant lived in a Gardena apartment with his girlfriend, Jodi Rigdon, their six-month-old baby, Sean, and Rigdon's three daughters, ages 9 to 12. Rigdon worked at a supermarket and the girls attended school, so appellant, who was unemployed, had daytime custody of Sean.

On May 10, 2005, at about 11:10 a.m., appellant knocked at the door of his neighbor Trace Edwards, and said he needed help, as Sean had fallen off the bed and wasn't breathing. Edwards admitted appellant, who held Sean, who was gasping for breath. As Edwards phoned 911, appellant blew into Sean's mouth and pumped his

---

[1] Section 273ab provides: "Any person who, having the care or custody of a child who is under eight years of age, assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished by imprisonment in the state prison for 25 years to life. Nothing in this section shall be construed as affecting the applicability of subdivision (a) of Section 187 or Section 189."

chest. Eventually Edwards put appellant on the phone with the operator. The 911 recording, played to the jury, reflected that after appellant reported, tearfully, that Sean was no longer breathing, the operator attempted to instruct appellant on beginning cardiopulmonary resuscitation (CPR).

At 11:18, paramedics Ernest Lopez and Dean Thornton arrived. They found Sean not breathing, and without heartbeat or pulse. Lopez ventilated Sean's airway, but after ascertaining that the heart wasn't beating and there was no pulse, he began chest compressions, "to stimulate a heartbeat, to push blood through the heart and to ventilate [the] patient."[2] This continued until Sean was transferred to an ambulance, and the CPR continued en route to the hospital.

Lopez testified that Sean was effectively dead, but revival measures continued so long as he did not meet county criteria for being declared dead. Lopez also stated he did not, as later claimed, tell appellant to call Sean's mother.

Gardena Police Officer Luis Villanueva escorted the ambulance to Gardena Memorial Hospital. There he saw hospital staff take charge of Sean, who showed no signs of life, and continue CPR. The physician in charge pronounced Sean dead at 12:30 p.m.

Gardena Police Sergeant David Mathieson arrived at appellant's apartment building shortly after noon. Appellant was sitting relaxed on a stairway, while officers went about their business. As the sergeant approached him, appellant said, referring to Sean's mother, "She's going to fucking kill me."

Gardena Police Officer Rodney Gonsalves interviewed appellant at the scene. Explaining that he provided day care for Sean, appellant said he had put Sean in the middle of the king-sized bed in the bedroom, and had gone to prepare a stroller, blanket, and bottle, so he could take Sean to the doctor, as he had a cold and had been coughing

---

[2] The compressions were done with two fingers of one hand, to a depth of one-half inch.

and fussy, yelling and crying. Appellant stated he himself had been "in a mess." Returning to the bedroom, he had found Sean on the floor, on his back and not breathing.

Appellant told Gonsalves he had attempted CPR, but not knowing how to do it, had brought Sean to Edwards's apartment where he at first could not rouse anyone. Appellant returned to his own apartment, tried CPR again, and when it wasn't successful he picked up Sean and shook him, also with no response. Appellant then returned to Edwards's door and was admitted. Appellant told Gonsalves he returned to his apartment to get Rigdon's work number, and when he couldn't find it he punched the wall outside the bedroom. (Gonsalves noticed that appellant had lacerated knuckles.) Appellant said he returned to Edwards's apartment and spoke to the 911 operator, who told him how to do CPR, which he then resumed.

Appellant also told Officer Gonsalves that Sean did not have any prior medical problems. They proceeded to the police station, where appellant remained calm and they chatted. Appellant was not under arrest. When Detective Nick Pepper arrived and told appellant that Sean had died, appellant "made a sobbing noise," but shed no tears. According to Gonzalves, appellant made changes in his story, and recounted he had tried to do too many things at once when preparing to go out with Sean.

Detective Pepper testified he had measured the height of the king-sized bed as three feet. He also interviewed appellant at the station, a few minutes after informing him Sean had died. Appellant said that Sean had been happy and fine, and had not been crying, although he had a cold and appellant intended to take him to the doctor. After finding him on the floor, appellant had breathed into Sean's mouth and also pressed on his stomach, although appellant did not know CPR. Appellant claimed that after the paramedics arrived, they told him to notify Rigdon what had happened. Appellant then returned to his apartment and when he could not find her number he punched the wall. Appellant also told Pepper Sean had not been sick, or crying, but appellant was taking him to the doctor because Rigdon wanted it.

Chrystal Wysinger, an upstairs neighbor of appellant, testified that before 6:00 a.m. a few days before Sean's death she heard him crying – as he did frequently – and she

also heard appellant say,"Shut the fuck up," several times. She testified that appellant had done this on other occasions.

The most contested issue at trial was the cause of Sean's death. Dr. David Whiteman, a Los Angeles County Deputy Medical Examiner, performed an autopsy the day after death. His initial examination disclosed no exterior injuries, except for petechial (pinpoint) hemorrhages on the inside of each eyelid.[3] Internal examination and x-rays revealed seven fractured ribs, at the posterior near the spine. The fractures were evidenced by healing tissue, and Dr. Whiteman estimated their varying ages at between two and four weeks and three to six weeks. There were also areas "suspicious for fractures" on the anterior of the ribs. Dr. Whiteman explained that children's ribs are relatively hard to break, because they are commonly attached and support each other. But encircled fingers squeezing an individual rib could fracture it.

Examining the thymus, a gland beneath the sternum in children, Dr. Whiteman found both petechial and larger hemorrhages throughout, the latter being bruises caused by trauma and broken blood vessels. He also found small hemmorhages on the exterior of the lungs and on the heart. There were no other injuries; in particular, the head, skull, and brain were normal. A neuropathologist who had examined the brain reported certain natural lesions, not traumatic or derived from a fall or abuse.

Dr. Whiteman opined that the cause of Sean's death was multiple traumatic injuries, caused by squeezing and compression of the chest. The bruising of the heart, lungs, and thymus, and the compression itself, caused suffocation and asphyxiation. There did not appear to be any fresh fractures of the ribs, but they would not necessarily occur if the ribs were not squeezed individually, with only a slight difference in hand position.

Dr. Whiteman further testified that Sean's organ injuries could not result from a fall from a bed, in which the ribs would protect the organs. Nor could they be caused by

---

[3] Dr. Whiteman and the other physician witnesses used the noun hemorrhage to mean pooling or accumulation of blood, from bleeding.

CPR, which induces less blood pressure than would cause internal hemorrhaging. Dr. Whiteman based this opinion in part on his approximately 500 autopsies of pediatric subjects, most of which had undergone CPR. Dr. Whitman also opined that Sean's death would have occurred within minutes of the squeezing, and that he could not hemorrhage after death. The Chief Medical Examiner, the office's chief of forensic medicine, and another deputy all had concurred in Dr. Whiteman's opinion about cause of death.

On cross-examination, Dr. Whiteman testified that although the prior rib fractures did not play a part in causing death, the history of compression they indicated contributed, along with the organ injuries, to his opinion of cause of death. He stated that untrained, improper CPR "may be possible to leave a bruise," but not of the dimensions here. Among the reasons he asked a neuropathologist to examine the brain was that it was 18 percent heavier than expected for a male child of his age (somewhat less enlarged for one of Sean's bodily dimensions, which were high for his age). The neuropathologist observed two to three months advanced development of myelin, an outer lining that develops along nerve fibers. On redirect, Dr. Whiteman stated that the radiologist who separately x-rayed the ribs observed possible fresh fractures, but as to which he could not be conclusive.

Respondent also called Dr. Carol Berkowitz, director of the pediatric outpatient department at Harbor-UCLA Hospital, professor of pediatrics at UCLA, and a consultant on child abuse. Having reviewed records in the case, she opined that the cause of Sean's death was asphyxiation or suffocation, caused by severe chest compression, which either prevented his breathing or injured his heart and impaired his oxygen circulation. The compression could occur either from a heavy object placed on the chest, or encircled compression by another person's hands. The compression of the thymus, lungs, and heart would cause bleeding and hence bruises. It would take at most a few minutes for asphyxiation to occur.

Dr. Berkowitz opined that Sean's *prior* rib fractures indicated nonaccidental trauma, involving encircled compression of the chest. There could be no other cause, and it had occurred on at least two prior occasions, given the extent of healing. The absence

of new rib fractures when the organs were injured indicated different hand positioning and type of pressure (extended and forceful versus rapid). Dr. Berkowitz also rendered opinions equivalent to Dr. Whiteman's regarding CPR and falling as a cause of the death. There was no record in the medical literature of injuries of Sean's type sustained from CPR.

Dr. Berkowitz opined that Sean's myelin development was in harmony with his overall development. An observed swelling of the brain was likely owing to oxygen deprivation. A seizure, of which Sean had no history, could not have caused death, but one could occur as death transpired. Finally, Sean could not have died from sudden infant death syndrome (SIDS), because that diagnosis requires a spotless health record, which both Sean's final and prior injuries would have negatived.

In his defense, appellant called two medical experts. The first was Dr. Harry Bonnell, a forensic consultant and former San Diego County Chief Deputy Medical Examiner. He had examined numerous medical reports on the case, including that of appellant's other expert, Dr. Gabriel, with which he agreed. Dr. Bonnell did not perceive a clear-cut cause of death. He testified the cause may have been a demonstrated brain abnormality, which could have caused a seizure, or also SIDS, as indicated by petechial hemorrhages in the chest, which appear in about 80 percent of SIDS cases.

Dr. Bonnell stated that these hemorrhages could have been caused by untrained CPR, which could augment blood flow to damaged areas. Dr. Bonnell perceived squeezing a baby and CPR compression as similar. He averred that such squeezing would force blood out of the chest, and not cause the organ bleeding seen here. Dr. Bonnell opined that that bleeding had been caused by CPR. But the hemorrhaging described in the autopsy report was also consistent with the chest being encircled and squeezed.

The radiologist's report, Dr. Bonnell stated, indicated possibly recent fractures that were healing, so they had to be at least several days old. The prior fractures had nothing to do with death. However, in his report Dr. Bonnell characterized Sean as an abused child who had suffered rib fractures in the weeks to months before his death, and the

doctor likewise testified that these injuries were consistent with Sean's being previously abused.

On cross-examination, Dr. Bonnell stated that bone injuries in infants generally stem from being picked up and shaken, or other violence. He agreed that Sean's injuries were not consistent with falling off a bed. Although Dr. Bonnell considered a brain abnormality and seizure a possible cause of death, he did not believe so with a reasonable degree of medical certainty, and hence that explanation was not in his report. He was unaware of literature reflecting CPR as a cause of hemorrhages, but he did not consider it a novel proposition. Dr. Bonnell defined SIDS as existing when there is no other explanation for the death.

Appellant also called Dr. Ronald Gabriel, a pediatric neurologist and UCLA professor emeritus, who had reviewed Sean's medical and pathology records. He opined that the cause of Sean's death was cardiopulmonary arrest due to a seizure, caused by massive overgrowth and density of brain cells. Sean had overdeveloped myelin cells, a congenital condition. Related to brain growth, the size of Sean's head was excessive even for his large body size.

Dr. Gabriel also opined that CPR could cause petechiae in the chest organs, and in this case, with all the CPR Sean received, that would have surely occurred. Intentional squeezing and suffocation were not indicated, given the virtual absence of bleeding in the eyes and in the skin, which are typical of death thus inflicted.

On cross-examination, Dr. Gabriel stated he could not attribute Sean's rib fractures to abusive trauma, absent studies of his bones for metabolic problems (which had not been conducted). Given the seriousness of the case, he would not have concluded the cause was abuse without such study. But he admitted that the posterior rib fractures were very suspicious, indeed probable, for abuse. Dr. Gabriel also admitted there was no proof Sean had died of a seizure, but he stated most quick deaths of babies with anomalous brains derived from seizures. Being squeezed to suffocation could induce one.

Dr. Gabriel stated that it was very possible, but not necessarily probable, that squeezing a six-month old hard for a minute or two would cause bruising of the lungs, heart, and thymus. But in his experience, CPR could also produce those effects.

Appellant did not testify. Veronica Gonzales, a neighbor of appellant's who had babysat Sean, testified that, from her observations of appellant with Sean and with Rigdon's other children, appellant was a good father. She had never heard him yell, "Shut the fuck up"; moreover, there was another family with a baby in the building. It was stipulated that the District Attorney had filed a complaint against appellant in July 2006, more than a year after Sean's death.

When instructing the jury, the court neither was requested to nor did give any instruction limiting the use and consideration of the evidence of Sean's prior rib fractures, such as CALCRIM No. 375 (evidence of uncharged offenses). In her final arguments, the prosecutor argued that the broken ribs were significant in that they indicated the same type of holding and squeezing as caused death, and reflected past abuse, and that appellant had squeezed Sean before the final occasion.

DISCUSSION

1. Sean's Prior Injuries.

Before the trial began, appellant moved to exclude evidence that Sean's ribs had been fractured several weeks before his death, on grounds that because those fractures were not a cause of death, and therefore the evidence was irrelevant. The court denied the request, stating, "It's [r]elevant on the issue of intent and the probative value outweighs prejudicial effect." Appellant now argues that for several reasons the evidence of prior rib fractures was irrelevant and inadmissible. As will appear, we do not agree.

Appellant primarily approaches the issue as one of admissibility under Evidence Code section 1101, which, with several exceptions, excludes evidence of a person's past behavior to prove his or her conduct on another occasion. (*Id.*, subd. (a).) Subdivision (b) of the section, however, authorizes admission of such prior conduct to prove a variety of facts, "other than [the person's] disposition to commit such act" ("propensity

evidence"). Sean's prior rib fractures, as testified to by Dr. Whiteman and other medical witnesses, actually were not proof of prior acts by appellant, or as uncharged offenses, as appellant would have it. That appellant inflicted these injuries was a fact requiring further proof and inferences. It therefore is not necessary that the prior injuries evidence have qualified as admissible under Evidence Code section 1101, subdivision (b) – although in many respects it did – for it to have been relevant and admissible.

Contrary to appellant's claim of irrelevance, the happening and existence of Sean's rib fractures were relevant, first, to establish that his later injuries and death resulted from intentional, abusive acts, rather than from accident or for that matter natural bodily processes. This was the essence of the controversy over cause of death, and the origin of the prior injuries bore circumstantially upon it. In a similar case, involving second degree murder of a two-year-old, the court held that the defendant's prior infliction of injuries on his children was properly admitted, to show that the victim's injuries were deliberately inflicted and arose from "nonaccidental means." (*People v. Evers* (1992) 10 Cal.App.4th 588, 598 (*Evers*); see *id.* at p. 599.)

Appellant argues that for the evidence of Sean's rib fractures to be admissible, it first had to be proven that appellant committed them. This argument, which targets "prior offenses" evidence under Evidence Code section 1101, misses the mark because here the injuries were relevant and admissible not as prior conduct by appellant, but to show that Sean's "death was the result of an intentional act by *someone*, and not an accident." (*Estelle v. McGuire* (1991) 502 U.S. 62, 69 [reinstating California conviction for second degree murder of six-month old daughter]; see *id.* at p. 68.) Appellant's argument that someone else – Rigdon, one of her daughters, or a babysitter – might have inflicted the broken ribs thus is not significant to their relevance.

Appellant further disputes the trial court's ruling that the evidence of rib fractures was relevant to intent. Although that ground need not be validated to sustain the evidence's relevance, appellant's argument is built on verbal misconstruction. Appellant asserts that neither of the charged offenses contained an element of specific intent. But the court's reference to intent surely embraced either general intent or the mental state

required for the murder charge, implied malice. (Cf. *Evers, supra,* 10 Cal.App.4th at pp. 598-599 [evidence of prior injuries relevant to show element of knowledge in the mental state for murder].)

Appellant yet disclaims the relevance of such proof on the ground that there was nothing at issue in the present case besides "cause of death." This assertion is incongruous, given that appellant is seeking acquittal on appeal for lack of substantial evidence of his knowledge that his conduct was dangerous to life. (See part 3, *post*.) Appellant never conceded that element, and respondent had the burden of proving each element of the offenses, beyond a reasonable doubt. (See *People v. Archerd* (1970) 3 Cal.3d 615, 638-639.) Together they comprised the prosecution's theory and version of "cause of death."

Ultimately, the evidence that Sean had undergone recent rib fractures was also relevant to the very issue of cause of death, in its scientific sense. One of the defense theories of cause of death, advanced by Dr. Bonnell, was SIDS. That cause was disputed by Dr. Berkowitz, who opined that Sean did not qualify for this diagnosis because it required a clean health record, which his rib and other injuries belied. That integral aspect of Sean's medical condition thus was relevant to the jury's evaluation of the cause of death.[4]

---

[4] Apart from the foregoing, respondent argues that evidence of Sean's rib fractures was admissible as propensity evidence, under Evidence Code section 1109, subdivision (a)(3), which provides for admissibility of evidence of child abuse by the defendant "in a criminal action in which the defendant is accused of an offense involving child abuse . . . if the evidence is not made inadmissible by Section 352." The statute also provides that this admissibility is "subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time . . . ." (*Ibid.*) Appellant responds that the evidence cannot be validated on this theory, because (1) it is a new theory that was never broached in the trial court; (2) the court therefore did not afford appellant the hearing on corroboration, etc., that is a precondition for admissibility; and (3) there was insufficient proof that appellant, rather than someone else in his household, inflicted the prior injuries. Because the fracture evidence was admissible on other grounds, as discussed above, we need not decide whether it was admissible under Evidence Code section 1109. (We note that the statute defines child

The remaining question regarding admission of the fractured ribs evidence is whether the trial court erred in ruling that its probative value outweighed any prejudicial effect it might have. (Evid. Code, § 352.) The court's exercise of its statutory discretion must stand unless it was abused, "'in an arbitrary, caprious or patently absurd manner . . . .'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) Here there was no such abuse. In view of the variety of medical reasons the experts ascribed for Sean's death, the evidence of his prior fractures, which several of the experts attributed to manual squeezing, was highly, if circumstantially, probative that the cause of death was further intentional squeezing, as opposed to some accidental or natural process. The prejudicial impact of the evidence was relatively insignificant, if prejudice is properly understood not simply as damaging to appellant's position but as uniquely evoking an emotional bias against him with little probative value regarding the issues. (E.g., *People v. Samuels* (2005) 36 Cal.4th 96, 124.) The trial court did not abuse its discretion in allowing the evidence that Sean's ribs had been fractured several weeks before his death.

2. Failure to Request Limiting Instruction.

As part of his argument about the admissibility of the prior rib fracture evidence, appellant advances what is really a separate contention, that his trial counsel rendered ineffective assistance (U.S. Const., Amend. 6; Cal. Const, art. I, § 15; IAC), by failing to request an instruction limiting the jury's consideration and use of that evidence. This contention too does not establish reversible error.

Establishing IAC requires a showing, first, that counsel's representation fell below an objective standard of reasonableness; and second, that the deficient representation was prejudicial, in that there is a reasonable probability that but for counsel's failings, the result would have been more favorable, i.e., the jury would have entertained a reasonable

---

abuse as "an act proscribed by Section 273d of the Penal Code" (Evid. Code, § 1109, subd. (d)(2)), and that a recent decision held that evidence of domestic child abuse could also be admitted under subdivision (a)(1) of the statute, relating to domestic violence (*People v. Dallas* (2008) 165 Cal.App.4th 940, 942-943).)

doubt. In this context, a reasonable probability is one sufficient to undermine confidence in the outcome. (*In re Neely* (1993) 6 Cal.4th 901, 908; *Strickland v. Washington* (1964) 466 U.S. 668, 687, 694-695.) When an IAC claim is advanced on direct appeal, rather than by habeas corpus with extrinsic evidence, and the record does not indicate the reason for counsel's omission, the claim must be rejected, unless there could be no satisfactory explanation (or counsel was asked for and did not provide one). (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.)

The instruction that appellant claims should have been requested would have told the jury they could not consider the prior fracture evidence as propensity evidence, i.e., to prove appellant was predisposed to commit the offenses. There are several possible reasons why counsel did not request such an instruction. The evidence was introduced as part of the medical experts' findings and opinions about cause of death, not as proof of a prior act by appellant. It therefore would have been inappropriate and counterproductive to give an uncharged offenses instruction, such as CALCRIM No. 375, which appellant adduces. Second, counsel may have reasonably contemplated that even a narrower propensity instruction would draw undue attention to the evidence, in a fashion for which it was not introduced. (*People v. Hinton* (2006) 37 Cal.4th 839, 878; *People v. Freeman* (1994) 8 Cal.4th 450, 495.)[5] Given these possible explanation for counsel's behavior, the claim of IAC fails. (*People v. Mendoza Tello, supra*, 15 Cal.4th at p. 267.)

3. Implied Malice.

Appellant's conviction of second degree murder required a finding of implied malice, which means performance of "'"an act, the natural consequences of which are dangerous to life, . . . deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life."'" (*People v. Knoller* (2007) 41 Cal.4th 139, 143, quoting *People v. Phillips* (1966) 64 Cal.2d 574,

---

5 *U.S. v. Myers* (7th Cir. 1990) 892 F.2d 642, cited by appellant, is distinguishable. It involved a hearsay statement by a codefendant that implicated the appellant but was inadmissible against her.

587.) Appellant contends that the jury's implied finding of this malice is not supported by substantial evidence of the subjective element, knowledge by appellant that his conduct endangered Sean's life. On this ground, appellant seeks reversal of the murder count, with directions, under Double Jeopardy principles, to enter a judgment of acquittal of that charge. We disagree with appellant's substantial evidence contention.

The question on review is whether, construing the evidence and indulging all reasonable inferences in favor of the judgment, a rational trier of fact could find beyond a reasonable doubt that appellant acted with knowledge that his squeezing of Sean as done on May 10, 2005, endangered Sean's life. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Brown* (1995) 35 Cal.App.4th 1585, 1598.) Appellant's position is that, having previously squeezed Sean twice "without deadly results," appellant could not have known of the danger to Sean's life when he squeezed him the third, fatal time.[6] Appellant asserts, "While [appellant] obviously committed an act which endangered his baby's life, due to the results when he squeezed his baby in the past he did not realize the risk involved."

Appellant's argument is unpersuasive. The relevant, evidentiary comparison between the squeezing that caused the broken ribs and the later, fatal squeezing, was that, as Dr. Berkowitz testified, the final instance involved severe and more extended squeezing (ultimately causing death). Whatever appellant may have learned or contemplated from the former squeezing – including how Sean had responded to it outwardly – there was substantial circumstantial evidence that appellant knew that his ultimate act was more dangerous, and threatened more serious consequences, than before.

That appellant knew that his final squeezing was dangerous to life is also supported, as findings of such knowledge often must be, by the overall circumstances. In addition to the conduct being unprecedentedly dangerous, the physical damage to Sean's internal organs behind the rib cage and the speed of his expiration give rise to inferences

---

6 The calculus of two prior squeezings derives from the medical testimony that the past rib fractures occurred in two different time spans.

of knowledge of the potential consequences. Moreover, it is common knowledge that squeezing an infant hard around the vital organs is a dangerous and threatening practice. (Cf. *People v. Dellinger* (1989) 49 Cal.3d 1212, 1222.) The evidence of implied malice was sufficient, and appellant's theory does not refute it.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COOPER, P. J.

We concur:

RUBIN, J.

FLIER, J.